

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JENNIFER ROBIN HICKOK	)	
	)	No. CV-10-331-JPH
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND REMANDING FOR FURTHER
MICHAEL J. ASTRUE, Commissioner	)	ADMINISTRATIVE PROCEEDINGS
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on November 4, 2011 (ECF Nos. 13, 15). Attorney David L. Lybbert represents Plaintiff; Special Assistant United States Attorney Jordan D. Goddard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge (ECF No. 6). On July 14, 2011, plaintiff filed a reply (ECF No. 17). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **REVERSES and REMANDS** for further administrative proceedings (ECF No. 13) and **DENIES** Defendant's Motion for Summary Judgment (ECF No. 15).

**JURISDICTION**

Plaintiff protectively applied for disability insurance benefits (DIB) on March 12, 2007, and for supplemental security income (SSI) on August 21, 2007, alleging onset beginning September 27, 2006 (Tr. 129-133, 143). The applications were

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1 denied initially (Tr. 62-64) and on reconsideration (Tr. 65-69).  
2 At a hearing before Administrative Law Judge (ALJ) Louis J. Volz,  
3 III, on October 7, 2009, plaintiff, represented by counsel, and a  
4 vocational expert (VE) testified (Tr. 23-58). On January 22, 2010,  
5 the ALJ issued an unfavorable decision (Tr. 10-16). The Appeals  
6 Council denied Ms. Hickok's request for review on August 10, 2010  
7 (Tr. 1-3). This made the ALJ's decision the final decision of the  
8 Commissioner, which is appealable to the district court pursuant  
9 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
10 review September 28, 2010 (ECF Nos. 2, 4).

#### 11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing  
13 transcript, the ALJ's decision, and the briefs of the parties.  
14 They are only briefly summarized here.

15 Plaintiff was 32 years old at onset and 36 on the date of the  
16 decision. She graduated from high school and attended college off  
17 and on for two years. She earned a license to sell insurance and a  
18 cosmetologist's certificate (Tr. 35-36, 38, 148). Plaintiff has  
19 worked as a loan officer, sales representative, hair stylist,  
20 manicurist, and receptionist (Tr. 55-56). In April 2007 she  
21 reported having eleven jobs in twelve years (Tr. 155). She suffers  
22 from bipolar disorder.

#### 23 **SEQUENTIAL EVALUATION PROCESS**

24 The Social Security Act (the Act) defines disability as the  
25 "inability to engage in any substantial gainful activity by reason  
26 of any medically determinable physical or mental impairment which  
27 can be expected to result in death or which has lasted or can be  
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1 expected to last for a continuous period of not less than twelve  
2 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
3 provides that a Plaintiff shall be determined to be under a  
4 disability only if any impairments are of such severity that a  
5 plaintiff is not only unable to do previous work but cannot,  
6 considering plaintiff's age, education and work experiences,  
7 engage in any other substantial gainful work which exists in the  
8 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,  
9 the definition of disability consists of both medical and  
10 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
11 (9<sup>th</sup> Cir. 2001).

12 The Commissioner has established a five-step sequential  
13 evaluation process for determining whether a person is disabled.  
14 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
15 is engaged in substantial gainful activities. If so, benefits are  
16 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
17 the decision maker proceeds to step two, which determines whether  
18 plaintiff has a medically severe impairment or combination of  
19 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

20 If plaintiff does not have a severe impairment or combination  
21 of impairments, the disability claim is denied. If the impairment  
22 is severe, the evaluation proceeds to the third step, which  
23 compares plaintiff's impairment with a number of listed  
24 impairments acknowledged by the Commissioner to be so severe as to  
25 preclude substantial gainful activity. 20 C.F.R. §§  
26 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
27 App. 1. If the impairment meets or equals one of the listed  
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1 impairments, plaintiff is conclusively presumed to be disabled. If  
2 the impairment is not one conclusively presumed to be disabling,  
3 the evaluation proceeds to the fourth step, which determines  
4 whether the impairment prevents plaintiff from performing work  
5 which was performed in the past. If a plaintiff is able to perform  
6 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§  
7 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's  
8 residual functional capacity (RFC) assessment is considered. If  
9 plaintiff cannot perform this work, the fifth and final step in  
10 the process determines whether plaintiff is able to perform other  
11 work in the national economy in view of plaintiff's residual  
12 functional capacity, age, education and past work experience. 20  
13 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,  
14 482 U.S. 137 (1987).

15 The initial burden of proof rests upon plaintiff to establish  
16 a *prima facie* case of entitlement to disability benefits.  
17 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
18 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
19 met once plaintiff establishes that a physical or mental  
20 impairment prevents the performance of previous work. The burden  
21 then shifts, at step five, to the Commissioner to show that (1)  
22 plaintiff can perform other substantial gainful activity and (2) a  
23 "significant number of jobs exist in the national economy" which  
24 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
25 Cir. 1984).

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27 **STANDARD OF REVIEW**

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1 Congress has provided a limited scope of judicial review of a  
2 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
3 the Commissioner's decision, made through an ALJ, when the  
4 determination is not based on legal error and is supported by  
5 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
6 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
7 "The [Commissioner's] determination that a plaintiff is not  
8 disabled will be upheld if the findings of fact are supported by  
9 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
10 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is  
11 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
12 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
13 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
14 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
15 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
16 evidence as a reasonable mind might accept as adequate to support  
17 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
18 (citations omitted). "[S]uch inferences and conclusions as the  
19 [Commissioner] may reasonably draw from the evidence" will also be  
20 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
21 review, the Court considers the record as a whole, not just the  
22 evidence supporting the decision of the Commissioner. *Weetman v.*  
23 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v.*  
24 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

25 It is the role of the trier of fact, not this Court, to  
26 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
27 evidence supports more than one rational interpretation, the Court  
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1 may not substitute its judgment for that of the Commissioner.  
2 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
3 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
4 evidence will still be set aside if the proper legal standards  
5 were not applied in weighing the evidence and making the decision.  
6 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
7 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
8 support the administrative findings, or if there is conflicting  
9 evidence that will support a finding of either disability or  
10 nondisability, the finding of the Commissioner is conclusive.  
11 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 12 **ALJ'S FINDINGS**

13 The ALJ found plaintiff's DIB insurance was effective through  
14 September 30, 2011 (Tr. 10, 12). At step one, he found plaintiff  
15 did not engage in substantial gainful activity after onset (Tr.  
16 12). At step two, the found she suffers from a medically  
17 determinable impairment, bipolar disorder, but it is not severe  
18 (Tr. 12). This was dispositive. The ALJ found at step two  
19 plaintiff was not disabled as defined by the Social Security Act  
20 between September 27, 2006, and the date of the decision, January  
21 22, 2010 (Tr. 16).

#### 22 **ISSUES**

23 Plaintiff contends the Commissioner erred as a matter of law  
24 when he found bipolar disorder is medically determinable but not  
25 severe. She alleges the ALJ erred when he weighed the evidence and  
26 assessed her credibility (ECF No. 14 at 10-14). The Commissioner  
27 answers that the ALJ properly relied on an examining  
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1 psychologist's opinion when he found plaintiff's mental impairment  
2 is not severe. The Commissioner asserts the ALJ's credibility  
3 determination is supported by clear and convincing reasons, and he  
4 properly weighed the opinion evidence. The Commissioner asks the  
5 Court to affirm (ECF No. 16 at 14).

6 The ALJ's decision is not supported by substantial evidence.

#### 7 DISCUSSION

##### 8 A. Weighing medical evidence - standards

9 In social security proceedings, the claimant must prove the  
10 existence of a physical or mental impairment by providing medical  
11 evidence consisting of signs, symptoms, and laboratory findings;  
12 the claimant's own statement of symptoms alone will not suffice.  
13 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
14 on the basis of a medically determinable impairment which can be  
15 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
16 medical evidence of an underlying impairment has been shown,  
17 medical findings are not required to support the alleged severity  
18 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.  
19 1991)(en banc).

20 A treating physician's opinion is given special weight  
21 because of familiarity with the claimant and the claimant's  
22 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
23 1989). However, the treating physician's opinion is not  
24 "necessarily conclusive as to either a physical condition or the  
25 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
26 751(9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
27 treating physician than an examining physician. *Lester v. Chater*,

1 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
2 given to the opinions of treating and examining physicians than to  
3 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
4 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
5 are not contradicted, they can be rejected only with clear and  
6 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
7 ALJ may reject an opinion if he states specific, legitimate  
8 reasons that are supported by substantial evidence. See *Flaten v.*  
9 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
10 1995).

11 In addition to the testimony of a nonexamining medical  
12 advisor, the ALJ must have other evidence to support a decision to  
13 reject the opinion of a treating physician, such as laboratory  
14 test results, contrary reports from examining physicians, and  
15 testimony from the claimant that was inconsistent with the  
16 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d at  
17 751-752; *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup> Cir. 1995).

#### 18 **B. Step two**

19 At step two, a claimant must establish that he or she suffers  
20 from a medically determinable impairment. See *Ukolov v. Barnhart*,  
21 420 F.3d 1002, 1004-1005 (9<sup>th</sup> Cir. 2005). Next, the claimant has  
22 the burden of proving that "these impairments or their symptoms  
23 affect [her] ability to perform basic work activities." *Edlund v.*  
24 *Massanari*, 253 F.3d 1152, 1159-1160 (9<sup>th</sup> Cir. 2001). Denial of a  
25 claim at step two is only appropriate if the medical signs,  
26 symptoms and laboratory findings establish only a slight  
27 abnormality that would not be expected to interfere with a



1 person's ability to work. This has been described as a "de  
2 minimus" screening device designed to dispose of groundless or  
3 frivolous claims. *Yuckert v. Bowen*, 841 F.2d 303 (9<sup>th</sup> Cir. 1988);  
4 SSR 85-28.

5 The ALJ found plaintiff "has the following medically  
6 determinable impairment: bipolar disorder controlled with  
7 medication" (Tr. 12). He based this assessment on the 2007 report  
8 of Thomas Genthe, Ph.D. (Tr. 14-15, referring to Tr. 399). Dr.  
9 Genthe opined plaintiff's bipolar disorder had been "effectively  
10 stabilized" with medication since at least March 2007 (Tr. 399).

11 Plaintiff alleged onset as of September 27, 2006. The record  
12 shows her condition was not effectively controlled with  
13 medication, beginning in 2005 (Tr. 213). From onset through  
14 October 29, 2007 (about 13 months), plaintiff's medications were  
15 changed approximately nineteen times. The court will not reiterate  
16 the many symptoms plaintiff described and her providers observed  
17 during this period, but they are numerous and clearly indicate  
18 medication did not consistently effectively control plaintiff's  
19 symptoms.

20 The record does not support the ALJ's step two determination.

21 **C. Weighing opinion evidence**

22 The ALJ is required to give clear and convincing reasons for  
23 rejecting a treating or examining physician's uncontradicted  
24 opinion, and specific, legitimate reasons supported by substantial  
25 evidence for rejecting their contradicted opinions. *Lester*, 81  
26 F.3d at 830; *Flaten*, 44 F.3d at 1463.

27 The ALJ gives reviewing psychologist Sharon Underwood,  
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1 Ph.D., 's opinion little weight because she is a reviewing rather  
2 than examining psychologist, and "her opinion is not completely  
3 consistent with the record" (Tr. 15). The ALJ does not point out  
4 the part of the record allegedly inconsistent with Dr. Underwood's  
5 opinion.

6 Instead, the ALJ goes on to discuss the opinions of treatment  
7 providers Peter Gourley, ARNP, and Norma Whitney, AA. The ALJ  
8 gives these opinions slight weight because they are not doctors,  
9 psychiatrists, or psychologists. It appears he gives them no  
10 weight at all.

11 The record indicates Dr. Underwood reviewed more records than  
12 Dr. Genthe. Her opinion is more consistent with the record as a  
13 whole, including the opinions of plaintiff's treatment providers  
14 and their records. The ALJ erred by giving nearly controlling  
15 weight to one examining psychologist's opinion, particularly when,  
16 as in this case, that opinion appears inconsistent with a  
17 longitudinal review of the record.

18 Moreover, the ALJ failed to give clear and convincing reasons  
19 for his credibility assessment. A circular statement that  
20 plaintiff's complaints are not credible to the extent they are  
21 inconsistent with the ALJ's opinion does not suffice.

22 While it is the ALJ's responsibility, not the Court's, to  
23 resolve conflicts in the evidence, *Richardson*, 402 U.S. at 400,  
24 the ALJ fails to clearly state legitimate reasons for rejecting  
25 most of the evidence.

26 After review the Court finds the ALJ committed harmful error.

27 **D. Remand**

28 On remand, the ALJ will assess plaintiff's credibility,  
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1 giving reasons for the determination; give reasons for accepting  
2 or rejecting the opinions of plaintiff's treatment providers; and  
3 conduct new steps 2-5 as necessary, including determining  
4 plaintiff's RFC, and seeking the opinions of medical and  
5 vocational experts if necessary.

6 The court wishes to make clear it expresses no opinion as to  
7 what the ultimate outcome on remand will or should be. The  
8 Commissioner is free to give whatever weight to the medical and  
9 other evidence he deems appropriate. *Sample v. Schweiker*, 694 F.2d  
10 639, 642 (9<sup>th</sup> Cir 1982)("[Q]uestions of credibility and resolution  
11 of conflicts in the testimony are functions solely of the  
12 Secretary.")

### 13 CONCLUSION

14 Having reviewed the record and the ALJ's conclusions, this  
15 Court finds the ALJ's decision is not free of legal error.

### 16 IT IS ORDERED:

17 1. Plaintiff's motion for summary judgment (**ECF No. 13**) is  
18 **granted**. The ALJ's decision is **REVERSED and REMANDED** for further  
19 administrative proceedings pursuant to sentence four.

20 2. Defendant's motion for summary judgment (**ECF No. 15**) is  
21 **denied**.

22 The District Court Executive is directed to file this Order,  
23 provide copies to counsel for plaintiff and defendant, enter  
24 judgment in favor of plaintiff, and **CLOSE** this file.

25 DATED this 29th day of November, 2011.

26 s/ James P. Hutton

27 JAMES P. HUTTON

28 UNITED STATES MAGISTRATE JUDGE

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